

PUBLIC VERSION

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VERIGY US, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VERIGY US, INC, a Delaware Corporation,

Plaintiff,

vs.

ROMI OMAR MAYDER, an individual;
WESLEY MAYDER, an individual; SILICON
TEST SYSTEMS, INC., a California Corporation;
and SILICON TEST SOLUTIONS, LLC, a
California Limited Liability Corporation,
inclusive,

Defendants.

Case No. C07 04330 RMW (HRL)

**VERIGY'S NOTICE OF MOTION AND
MOTION TO COMPEL DISCOVERY
RESPONSES FROM STS, INC. RE 2ND
SET OF INTERROGATORIES and 1st SET
OF REQUESTS FOR ADMISSIONS**

Date: October 21, 2008
Time: 10 a.m.
Ctrm.: 2, 5th Floor
Judge: Hon. Howard R. Lloyd

Complaint Filed: August 22, 2007
Trial Date: None Set

AND RELATED CROSS-ACTIONS

**PUBLIC VERSION OF
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NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on Tuesday, October 21, 2008, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Hon. Howard R. Lloyd, United States Magistrate Judge, Courtroom 2, Fifth Floor, of the United States District Court for the Northern District of California, San Jose Division, 280 South First Street, San Jose, California, plaintiff Verigy U.S., Inc. ("Verigy"), shall and hereby does move the Court for an order compelling defendant Silicon Test Systems, Inc. ("STS") to produce responses to Interrogatory Nos. 23(b) - 32 of Verigy's 2nd Set of Interrogatories and responses to Request for Admissions ("RFA") Nos. 27-42 of Verigy's 1st Set of RFAs.

The motion is based upon this notice of motion and motion, the supporting memorandum of points and authorities, the declaration of Colin G. McCarthy, the complete files and records in this action, and such additional evidence and argument as may hereinafter be presented.

STATEMENT OF ISSUES

1. Should STS, Inc. be compelled to provide responses to Interrogatories Nos. 23(b) - 32 of the 2nd Set of Interrogatories propounded by Verigy to STS?

2. Should STS, Inc. be compelled to provide response to RFAs Nos. 27-42 of the 1st Set of RFAs propounded by Verigy to STS?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND

This is a trade secret misappropriation action. Plaintiff Verigy propounded Interrogatories, Set Two to STS on July 30, 2008. (*See*, Declaration of Colin G. McCarthy ("McCarthy Decl."), ¶ 3) STS has failed and refused to provide responses to Interrogatories Nos. 23(b) - 32 of the 2nd Set of Interrogatories propounded by Verigy to STS. (McCarthy Decl., ¶ 4, Ex. B). STS has also failed to provide response to RFA Nos. 27-42 of the 1st Set of RFAs propounded by Verigy to STS, although STS has agreed to respond. (McCarthy Decl., ¶¶ 6- 8, Exhs C and D). Defendants claim the number of interrogatories exceeds the permitted amount, in

1 part due to impermissible subparts.

2 Counsel met and conferred by telephone regarding the matters in dispute and were unable
3 to resolve their issues. (McCarthy Decl., ¶ 4). Defendants refused to respond to these
4 Interrogatories and stood on their subpart objections.¹ Accordingly, Verigy hereby moves to
5 compel responses on such interrogatories. (McCarthy Decl., ¶ 4).

6 **II. DISCOVERY IN DISPUTE**

7 **A. Second Set of Interrogatories**

8 **Verigy's Interrogatory No. 23:** *IDENTIFY (a) the factual basis for your affirmative*
9 *defense number one as stated in the CORRECTED ANSWER and (b) all documents*
supporting affirmative defense number one.

10 **Defendants' Interrogatory Response to No. 23:** [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

14 **Reasons Verigy is entitled to the discovery** of this interrogatory because it directly relates to
 15 one of Defendants' affirmative defenses and because identifying documents supporting the response
 16 should be construed as just one interrogatory in this and prior interrogatories.

17 **The requirements of Fed. R. Civ. P. 26(b)(2) are met** because Defendants are the sole
 18 possessor of the information. There is no other source for the information. Defendants cannot
 19 show that explaining their position and identifying documents would cause them undue burden
 20 such as to outweigh the benefit to Verigy in this relevant information.

21 **Verigy's Interrogatory No. 24:** *IDENTIFY (a) the factual basis for your*
 22 *affirmative defense number two as stated in the CORRECTED ANSWER and (b)*
all documents supporting affirmative defense number two.

23 **Defendants' Interrogatory Response to No. 24:** [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

27 ¹ They agreed to revisit the issue and advise if they would withdraw the objections, but had not
 28 done so by the deadline to file this motion. (McCarthy Decl., ¶ 4).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 **Reasons Verigy is entitled to the discovery** of this interrogatory because it directly relates
5 to one of Defendants' affirmative defenses and because identifying documents supporting the
6 response should be construed as just one interrogatory in this and prior interrogatories.

7 **The requirements of Fed. R. Civ. P. 26(b)(2) are met** because Defendants are the sole
8 possessor of the information. There is no other source for the information. Defendants cannot
9 show that explaining their position and identifying documents would cause them undue burden such
10 as to outweigh the benefit to Verigy in this relevant information.

11 **Verigy's Interrogatory No. 25:** *IDENTIFY (a) the factual basis for your*
12 *affirmative defense number three as stated in the CORRECTED ANSWER and (b)*
all documents supporting affirmative defense number three.

13 **Defendants' Interrogatory Response to No. 25:** [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 **Reasons Verigy is entitled to the discovery** of this interrogatory because it directly relates
20 to one of Defendants' affirmative defenses and because identifying documents supporting the
21 response should be construed as just one interrogatory in this and prior interrogatories.

22 **The requirements of Fed. R. Civ. P. 26(b)(2) are met** because Defendants are the sole
23 possessor of the information. There is no other source for the information. Defendants cannot show
24 that explaining their position and identifying documents would cause them undue burden such as to
25 outweigh the benefit to Verigy in this relevant information.

26 **Verigy's Interrogatory No. 26:** *IDENTIFY (a) the factual basis for your*
27 *affirmative defense number five as stated in the CORRECTED ANSWER and (b)*
all documents supporting affirmative defense number five.

Defendants' Interrogatory Response to No. 26: [REDACTED]

Reasons Verigy is entitled to the discovery of this interrogatory because it directly relates to one of Defendants' affirmative defenses and because identifying documents supporting the response should be construed as just one interrogatory in this and prior interrogatories.

The requirements of Fed. R. Civ. P. 26(b)(2) are met because Defendants are the sole possessor of the information. There is no other source for the information. Defendants cannot show that explaining their position and identifying documents would cause them undue burden such as to outweigh the benefit to Verigy in this relevant information.

Verigy's Interrogatory No. 27: *IDENTIFY (a) the factual basis for your affirmative defense number seven as stated in the CORRECTED ANSWER and (b) all documents supporting affirmative defense number seven.*

Defendants' Interrogatory Response to No. 27: [REDACTED]

Reasons Verigy is entitled to the discovery of this interrogatory because it directly relates to one of Defendants' affirmative defenses and because identifying documents supporting the response should be construed as just one interrogatory in this and prior interrogatories.

The requirements of Fed. R. Civ. P. 26(b)(2) are met because Defendants are the sole possessor of the information. There is no other source for the information. Defendants cannot show

1 that explaining their position and identifying documents would cause them undue burden such as to
2 outweigh the benefit to Verigy in this relevant information.

3 **Verigy's Interrogatory No. 28:** *IDENTIFY (a) all product development costs for*
4 *DEFENDANTS' PRODUCTS and (b) all documents supporting such costs.*

5 **Defendants' Interrogatory Response to No. 28:** [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 **Verigy is entitled to the discovery** because Defendants' product costs relate directly to
12 Verigy's damages claims and because identifying documents supporting the response should be
13 construed as just one interrogatory in this and prior interrogatories.

14 **The requirements of Fed. R. Civ. P. 26(b)(2) are met** because Defendants are the sole
15 possessor of the information. There is no other source for the information. Defendants cannot
16 show that explaining the claimed differences would cause them undue burden such as to
17 outweigh the benefit to Verigy in relevant information on its trade secrets and damages.

18 **Verigy's Interrogatory No. 29:** *Describe in detail how the '791 PATENT is*
19 *dissimilar to and not based on any invention or technology described and/or*
20 *claimed in U.S. Provisional Patent Application Serial No. 60/827,253.*

21 **Defendants' Interrogatory Response to No. 29:** [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 **Verigy is entitled to the discovery** because the 791 PATENT appears to be substantially
26 similar to U.S. Provisional Patent Application Serial No. 60/827,253. Both the '791 Patent and
27 the provisional patent application are at issue in this case. Verigy is entitled to know the basis for
28 any claims by Defendant that their patents cover the same or different technology.

1 **The requirements of Fed. R. Civ. P. 26(b)(2) are met** because Defendants are making
 2 the contention. There is no other source for the information on Defendants' contention, and
 3 Defendants cannot show that explaining the claimed differences would cause them undue burden
 4 such as to outweigh the benefit to Verigy on this relevant information.

5 **Verigy's Interrogatory No. 30: IDENTIFY all facts that refer or relate to the**
 6 *alleged conception and/or reduction to practice of the invention described and/or*
 7 *claimed in U.S. Provisional Application Serial No. 60/827,253, including when*
and the circumstances under which MAYDER conceived and/or reduced the
invention to practice.

8 **Defendants' Interrogatory Response to No. 30:** [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]

13 **Verigy is entitled to the discovery** because the **U.S. Provisional Patent Application**
 14 **Serial No. 60/827,253** was drafted by Mayder while he was still employed at Verigy, and is at
 15 issue in this case. As a remedy in this action, Verigy will seek assignment of Mayder's right to
 16 the patent and ownership of any related intellectual property.

17 **The requirements of Fed. R. Civ. P. 26(b)(2) are met** because Defendants deny
 18 misappropriating Verigy's trade secrets. There is no other source for the information on Defendants'
 19 denial, and Defendants cannot show that explaining the conception and/or reduction to practice of
 20 this device would cause them undue burden such as to outweigh the benefit to Verigy in relevant
 21 information on its trade secrets and damages.

22 **Verigy's Interrogatory No. 31: IDENTIFY all facts that refer or relate to the**
 23 *alleged conception and/or reduction to practice of the invention claimed in the*
 24 *UTILITY PATENT APPLICATION, including when and the circumstances under*
which MAYDER conceived and/or reduced the invention to practice.

25 **Defendants' Interrogatory Response to No. 31:** [REDACTED]
 26 [REDACTED]
 27 [REDACTED]

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[REDACTED]

The requirements of **Fed. R. Civ. P. 26(b)(2)** are met because Defendants deny misappropriating Verigy's trade secrets. There is no other source for the information on Defendants' denial, and Defendants cannot show that explaining the conception and/or reduction to practice of this utility patent would cause them undue burden such as to outweigh the benefit to Verigy in relevant information on its trade secrets and damages.

Verigy's Interrogatory No. 32: *IDENTIFY all material facts supporting YOUR contention that any trade secret on Verigy's Amended Trade Secret Disclosure is not entitled to protection under Cal. Civ. Code 3426.1 et seq.*

Defendants' Interrogatory Response to No. 32: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Verigy is entitled to this discovery because the interrogatory bears directly on its trade secrets cause of action, in that Defendants have asserted that the trade secrets are readily ascertainable.

The requirements of **Fed. R. Civ. P. 26(b)(2)** are met because Defendants deny misappropriating Verigy's trade secrets. There is no other source for the information on Defendants' denial, and Defendants cannot show that explaining why Verigy's trade secrets are not entitled to protection would cause them undue burden such as to outweigh the benefit to Verigy in relevant information on its trade secrets.

B. 1st Set of RFAs by Verigy to Romi Mayder

1 **Verigy's RFAs 27-42:** the contents of these RFAs and Mayder's responses are set forth in
 2 their entirety, and hereby incorporated by reference, in Exhibits C and D to the McCarthy
 3 Declaration. (McCarthy Decl., ¶¶ 7, 8, Exhs C and D).

4 **STS, Inc. Response to RFAs 27-42:** (Identical for each RFA): R. Mayder objects to this
 5 Request as exceeding the number of such Requests permitted under the Courts CMC Order.

6 **Verigy is entitled to the discovery** because the RFAs in question are directed at factual
 7 admissions which will obviate the need for trial on the particular issues. The RFAs seek
 8 Mayder's admission that he disclosed confidential information to third parties (RFAs 26-32),
 9 which are relevant to Verigy's trade secret and breach of contract causes of action. The RFAs
 10 seek Mayder's admission that he took confidential information from Verigy computers (RFAs
 11 33-35), which are relevant to Verigy's computer fraud and related causes of action. The RFAs
 12 seek Mayder's admission that he did not inform or seek permission from Verigy to pursue use of
 13 Verigy's trade secrets after he left Verigy (RFAs 36-42), which are obviously relevant to, again,
 14 Verigy's trade secret and breach of contract causes of action.

15 **The requirements of Fed. R. Civ. P. 26(b)(2) are met** because only Defendants can
 16 admit or deny these requests. There is no other source for the admission than Defendants, and
 17 Defendants cannot show that explaining why to do so would cause them undue burden such as to
 18 outweigh the benefit to Verigy in having these admissions.

19 **III. AUTHORITY AND ARGUMENT**

20 **A. VERIGY'S INTERROGATORIES DO NOT CONTAIN SUBPARTS AND** 21 **DEFENDANTS THUS MUST RESPOND TO NOS. 23(b)-32**

22 Defendants have refused to respond to all or part of Verigy's Interrogatories 23-32. The
 23 claimed basis for this refusal is that Verigy has served interrogatories which in number and with
 24 impermissible subparts exceed the total number of interrogatories permitted by the Court and
 25 Fed. R. Civ. P. 33 (a). Verigy has not served more than the 25 permitted by the Court in its May
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24, 2008 order.² Defendants' contention that these interrogatories contain subparts is unsupported in fact or law. Each interrogatory in question either stands on its own as an independent question or contains identified subparts which are "logically or factually subsumed within and necessarily related to the primary question." *Safeco of America v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998); (citations omitted).

1. Verigy's Interrogatories Do Not Exceed the Court's Limit

Pursuant to the Court's July 24, 2008 CMC Order, both sides were permitted to serve twenty-five (25) interrogatories in addition to those served prior to May 23, 2008. (Docket No. 274.)³ Defendants answered Interrogatories 8- 23(a) and objected to Interrogatories 23(b)-32 on the grounds that such interrogatories were "impermissible in light of the limit on Interrogatories imposed by the Court in its May 23, 2008 Case Management Order." (McCarthy Decl., Ex.B). Even assuming, *arguendo*, that Defendants are correct that Interrogatories 10, 17, and 23-28 contain impermissible subparts, Defendants did not comply with the CMC Order, as, by their own count, they only responded to eighteen (18) additional interrogatories (up to and including Interrogatory 23(a)). As Verigy is entitled to receive responses to 25 interrogatories, at the very least, Defendants must respond to seven additional interrogatories to comply with the Court's CMC Order.

2. None of Verigy's Interrogatories Contain Impermissible Subparts

"Without leave of court ..., any party may serve on any other party written interrogatories, not exceeding 25 in number including all discrete subparts..." *Fed. R. Civ. P. 33* (a). Subparts are permitted and counted as one interrogatory so long as they are not "discrete." Subparts are not "discrete," and are therefore permitted, if "they are logically or factually subsumed within and necessarily related to the primary question." *Safeco* 181 F.R.D. at 445: (citation omitted). Review of the authority in this circuit suggests there is no "bright-line test" and that the determination is

² Except for Interrogatory 33, which constituted a 26th interrogatory and was withdrawn. (Verigy's counsel's September 4, 2008 letter, Declaration of Colin G. McCarthy ISO Verigy's Motion to Compel Response to RFP 3 and 5; Exhibit F).

³ The limit is also reflected in the Court's May 23, 2008 Minute Order. (Docket No. 219.)

1 made on a case by case basis. *Id.* at 445-447.

2 Defendants claim that Interrogatories 10, 17 and 23-28 contain impermissible subparts.
 3 Verigy is unable to ascertain the basis for this objection with respect to Interrogatory 17, as it asks
 4 STS to describe “all actions MAYDER took in anticipation of, preparation for, and in connection
 5 with his termination of employment at VERIGY, including but not limited to the return or retention
 6 of VERIGY property and VERIGY confidential information; any exit interviews; any discussions
 7 with third parties; and any copying or transferring of documents, files, contact information, and
 8 materials at VERIGY and at MAYDER’s home, including on MAYDER’s home computer(s).”
 9 Although this interrogatory contains multiple clauses, it does not contain any discrete subparts, as
 10 the interrogatory is clearly asking STS to describe the actions Mayder took while he was preparing
 11 to terminate his employment with Verigy. The portion of the interrogatory following “including but
 12 not limited to” merely points STS at specific types of actions it should include in its response.
 13 Therefore, Interrogatory 17 should be treated as one interrogatory for purposes of the 25
 14 interrogatory limit.

15 Interrogatories 10 and 23-28 each ask STS to identify material facts and documents relating
 16 to one subject. Five of these Interrogatories (23-27) relate to five of Defendants’ affirmative
 17 defenses, asking STS to identify material facts and documents supporting each of the five
 18 affirmative defenses. Interrogatory 10 asks STS to identify material facts and documents relating to
 19 instances where Mayder informed Verigy of the formation of STS. Finally, Interrogatory 28 asks
 20 STS to identify material facts and documents relating to product development. Interrogatories 10
 21 and 23-28 each constitute only one interrogatory, as the subparts (facts and documents) are
 22 “necessarily related to the primary question” and “logically subsumed within” it to support each
 23 affirmative defense. *Safeco*, 181 F.R.D. at 445.

24 In *Trevino v. ACB American, Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006), this Court held that
 25 interrogatories which asked defendant to identify four separate pieces of information about “all
 26 litigation filed against [defendant] alleging violations of the Fair Debt Collection Practices Act”,
 27 constituted only one interrogatory for purposes of the numerical limit. The plaintiff asked for the

1 “caption, court, civil action number, and result of all such litigation. These four subparts were, as
2 here, “subsumed within and related to the primary question.” *Trevino*, 232 F.R.D. at 614.

3 Similarly, in *Zamora v. D’Arrigo Brothers*, 2006 WL 931728 this Court ruled that a question
4 asking “several identifying questions” about one topic area was not discrete for purposes of the
5 numerical limit. . There, plaintiff asked defendant in its second interrogatory a question with at
6 least four subparts. The plaintiff used the interrogatory to ask the defendant to provide “all
7 identifying and explanatory information” such as “gender, date of promotion, other candidates
8 considered, and the reason for selecting” persons” promoted to foreman positions *and* positions that
9 related to the operation of machinery.”⁴ *Zamora*, at *2 and *4. (emphasis in original). The plaintiff
10 also sought to use the *same* interrogatory to obtain the same identifying information for persons
11 *rejected* for those positions. This Court held that in so delineating, the plaintiff was really asking
12 two interrogatories. The Plaintiff asked “several identifying questions about people promoted to
13 supervisory positions” while also asking the same identifying questions about rejected for the
14 positions. *Zamora*, at *4. From the Court’s analysis, it appears that it was not the “several
15 identifying questions” that caused this Court to split the interrogatory, but rather the two distinct
16 topic areas. As each of Verigy’s interrogatories is directed to one topic area, the subparts seeking
17 identifying information (facts and documents) are not discrete subparts.

18 Further, in *Lawrence v. First Kansas Bank & Trust Co.*, 169 F.R.D. 657, 660-661
19 (D.Kan.1996), the court allowed plaintiffs to seek facts, documents and witnesses related to an
20 affirmative defense within one interrogatory. . The *Lawrence* court held that questions that were
21 directed at the defendant’s affirmative defenses could include subparts seeking identifying
22 information. The *Lawrence* court required the defendant to provide for the single interrogatory, “the
23 principal or material facts upon which it base[d] the defense,” identify documents supporting the
24 affirmative defense, and provide witnesses with knowledge on that defense. *Id.*, at 664. As Verigy’s
25 interrogatory requests similarly asks STS to identify facts and documents, the subparts should not

26
27 ⁴ The text of the interrogatory is not fully set forth in the opinion.

1 count toward the numerical limit.

2 Finally, Chief Magistrate Judge James Larson held in *McConnell v. Pacificorp, Inc.*, [2008](#)
 3 [WL 3843003](#) that use of one interrogatory to ask for “facts, witness, and documents” did not cause
 4 the interrogatory to constitute multiple interrogatories. , at*4. It was the use of three requests for
 5 admissions (“RFAs”) within that single interrogatory which made it constitute “three separate
 6 interrogatories.” *McConnell*, at *4. The three underlying RFAs in *McConnell* separately concerned
 7 past, present and future injuries. The interrogatory was directed at the three RFAs, seeking “facts,
 8 witnesses, and documents” substantiating the basis for denial of the three requests. *Id.*, at *3. Again,
 9 it was the three separate topic areas of the underlying RFAs that supported a finding of three
 10 separate interrogatories, not the three categories of identifying information on each topic area.
 11 “Since it seeks facts, witnesses, and documents ... for three separate RFAs, [the interrogatory]
 12 should be framed as three separate requests.” *Id.*, at *4. Verigy’s interrogatories similarly seek
 13 “facts and documents” on a single topic area, and therefore the purported subparts should not count
 14 against the numerical limit and Defendants should be ordered to provide answers to those
 15 interrogatories.

16 **B. DEFENDANTS SHOULD RESPOND TO RFAS 27-42**

17 Pursuant to the Court’s CMC Order, Verigy was permitted to serve 96 requests for
 18 admission. The First Set of Requests for Admission to Romi Mayder contains 42 requests for
 19 admission, yet Mayder answered only the first 25 requests and objected to the remaining 17
 20 requests. (McCarthy Decl., ¶ 9). Mayder has agreed to supplement and respond to all requests, but
 21 has not yet served its supplemental response. (McCarthy Decl., ¶ 6). As today is the last day to
 22 move to compel pursuant to Local Rule 26-2, Verigy brings this motion to ensure compliance with
 23 the agreement. If Mayder serves the supplemental responses prior to the hearing date of the motion,
 24 Verigy will withdraw this portion of the motion to compel.

1 **IV. CONCLUSION**

2 For the forgoing reasons, Verigy respectfully requests that the Court issue an order
3 compelling STS, Inc. to further responses to Interrogatories Nos. 23 (b) - 32 of the 2nd Set of
4 Interrogatories and RFAs Nos. 27-42 of the 1st Set of RFAs propounded by Verigy to STS, Inc.

5 Dated: September 10, 2008

BERGESON, LLP

6
7 By: _____/s/_____
Michael W. Stebbins

8
9 Attorneys for Plaintiff
VERIGY US, INC.